

NOT FOR CITATION

**IN THE UNITED STATES DISTRICT COURT**

**FOR THE NORTHERN DISTRICT OF CALIFORNIA**

**SAN JOSE DIVISION**

EVAGELIA LISA VORGAS,

Plaintiff,

v.

THE STATE BAR OF CALIFORNIA, ROBERT  
HAWLEY, LAWRENCE J. DAL CERRO, and  
SEIU LOCAL 535,

Defendants.

Case Number C 05-5039 JF (PVT)

ORDER<sup>1</sup> GRANTING MOTION TO  
DISMISS OF HAWLEY AND DAL  
CERRO WITHOUT LEAVE TO  
AMEND

[re doc. no. 26]

Defendants Robert Hawley (“Hawley”) and Lawrence Dal Cerro (“Dal Cerro”) move to dismiss the first amended complaint of Plaintiff Evagelia Lisa Vorgias (“Vorgias”). The Court has considered the briefing submitted by the parties as well as the oral arguments presented at the hearing on November 17, 2006. For the reasons discussed below, the motion will be granted without leave to amend.

**I. BACKGROUND**

This action arises out of the dismissal of Plaintiff Evagelia Lisa Vorgias (“Vorgias”) from her position of prosecutor in the Office of the Chief Trial Counsel of the California State Bar

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<sup>1</sup> This disposition is not designated for publication and may not be cited.

1 (“State Bar”). Vorgias alleges that she worked as a State Bar prosecutor from November 1987  
2 until she was placed on investigatory suspension for alleged misconduct in May 2003. Among  
3 other things, Vorgias was alleged to have been incompetent, negligent, dishonest and absent  
4 without leave. The State Bar conducted an investigation and scheduled a *Skelly* hearing<sup>2</sup> for  
5 August 2003. Vorgias alleges that she was not provided with relevant documents necessary to  
6 prepare for the hearing. She also alleges that her supervisors, Hawley (State Bar Deputy  
7 Director) and Dal Cerro (State Bar Assistant Chief Trial Counsel), destroyed a security camera  
8 videotape that was relevant to the charges against her, improperly used her work access card  
9 records to determine whether she was present in the building at particular times, and improperly  
10 relied upon contents of her computer files. The State Bar terminated Vorgias’ employment in  
11 October 2003.

12 Shortly after her termination, Vorgias filed a grievance through her union, SEIU Local  
13 535. Vorgias alleges that SEIU Local 535 delayed progress on her grievance, failed to  
14 communicate with her, failed to pursue settlement options with the State Bar, failed to seek  
15 witnesses and other exculpatory evidence, and otherwise failed in its duty of representation. She  
16 also alleges that Hawley and Dal Cerro falsely represented to SEIU Local 535 that Vorgias had  
17 been provided with all investigative reports to which she was entitled. She alleges that Hawley  
18 suggested that he would be more sympathetic to Vorgias’ case if she would answer questions  
19 without reviewing the investigative reports. She further alleges that Hawley and Dal Cerro  
20 threatened her with attorney discipline while extending an offer to settle her grievance. In June  
21 2004, Vorgias wrote to Hawley, objecting to the appointment of the particular investigator who  
22 had been assigned to her case and requesting that she be allowed to present additional witnesses  
23 and evidence. Hawley and Dal Cerro refused those requests. Vorgias’ subsequent requests to  
24 permit additional evidence likewise were denied. In March 2005, SEIU Local 535 notified  
25 Vorgias that it would not pursue arbitration in her case. In June 2005 Vorgias was notified that  
26 the union would uphold the decision of Local 535.

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28 <sup>2</sup>A *Skelly* hearing is a pretermination opportunity for the employee to respond to the  
charges against him or her. *See Skelly v. State Personnel Bd.*, 15 Cal.3d 194, 215 (1975).

Vorgias filed the instant action on December 6, 2005 and, following dismissal with leave to amend, filed the operative first amended complaint ("FAC") on August 31, 2006. The FAC alleges (1) a claim that Hawley and Dal Cerro violated her due process rights and (2) a claim that SEIU Local 535 violated its duty of fair representation. The Court dismissed Vorgias' claim against SEIU Local 535 without leave to amend on November 2, 2006. As a result the only claim remaining in the case is the civil rights claim against Hawley and Dal Cerro.

## II. LEGAL STANDARD

For purposes of a motion to dismiss, the plaintiff's allegations are taken as true, and the Court must construe the complaint in the light most favorable to the plaintiff. *Jenkins v. McKeithen*, 395 U.S. 411, 421 (1969). Leave to amend must be granted unless it is clear that the complaint's deficiencies cannot be cured by amendment. *Lucas v. Department of Corrections*, 66 F.3d 245, 248 (9th Cir. 1995). When amendment would be futile, however, dismissal may be ordered with prejudice. *Dumas v. Kipp*, 90 F.3d 386, 393 (9th Cir. 1996).

## III. DISCUSSION

Section 1983 imposes liability on any person who deprives another of a federally protected right while acting under the color of state law. 42 U.S.C. § 1983. To make out a claim under § 1983, the plaintiff must allege that (1) the defendant acted under color of state law, and (2) deprived the plaintiff of rights secured by the United States Constitution or federal statutes. *Ortez v. Washington County*, 88 F.3d 804, 810 (1996). Vorgias alleges that Hawley and Dal Cerro, acting under color of state law as officials of the State Bar, terminated her employment without affording her due process.

Hawley and Dal Cerro argue that Vorgias' due process claim is time-barred. The Court agrees. A claim that employment was terminated without due process accrues when the plaintiff is informed that the decision to terminate is final and that no more pre-termination process is available. *Delaware State College v. Ricks*, 449 U.S. 250, 259-61 (1980). It appears on the face of the FAC that Plaintiff's pre-termination process (the *Skelly* hearing) commenced in August 2003 and was concluded prior to her termination in October 2003. Vorgias did not file this action until December 2005, after the applicable two-year limitations period had expired.

1 *See Maldonado v. Harris*, 370 F.3d 945, 954-55 (9th Cir. 2004) (noting applicability of two-year  
2 statute of limitations to § 1983 claims).

3 At the hearing, Vorgias asserted that she is entitled to equitable tolling. The basis for her  
4 assertion is not entirely clear. To the extent that she asserts equitable tolling on the ground that  
5 she was pursuing a post-termination grievance proceeding, the Supreme Court has held that “the  
6 pendency of a grievance, or some other method of collateral review of an employment decision,  
7 does not toll the running of the limitations period.” *Ricks*, 449 U.S. at 261. “The grievance  
8 procedure, by its nature, is a *remedy* for a prior decision, not an opportunity to *influence* that  
9 decision before it is made.” *Id.* at 261.

10 To the extent that Vorgias asserts equitable tolling on the ground that she was pursuing an  
11 EEOC proceeding, pursuit of such a proceeding is insufficient to toll a claim brought under §  
12 1983. *See London v. Coopers & Lybrand*, 644 F.2d 811, 815 (9th Cir. 1981) (statute of  
13 limitations for § 1981 claim not tolled during pendency of EEOC proceeding); *Reese v. City of*  
14 *Emeryville Fire Dept.*, 746 F. Supp. 987, 988 (N.D. Cal. 1990) (extending *London* to § 1983  
15 claims).

16 Vorgias alternatively argues that her claim against Hawley and Dal Cerro is not time-  
17 barred because Hawley and Dal Cerro engaged in a continuing violation of her civil rights after  
18 the date of her termination. The continuing violation doctrine does not apply to termination of  
19 employment or other discrete, actionable conduct. *National R.R. Passenger Corp. v. Morgan*,  
20 536 U.S. 101, 114 (2002).

21 The Court is troubled by Vorgias’ allegations that Hawley and Dal Cerro engaged in  
22 affirmative misconduct during her post-termination grievance proceedings. At the hearing, the  
23 Court questioned both sides closely as to what remedies, if any, might lie for such alleged  
24 misconduct. Counsel for Defendants asserted that, whatever remedies might apply to such  
25 misconduct in the abstract, the only claim Vorgias has alleged in *this* case is deprivation without  
26 due process of her property interest in her employment, and that claim clearly is time-barred.  
27 Having conducted its own research into the issue, the Court must agree. “Process is not an end in  
28 itself. Its constitutional purpose is to protect a substantive interest to which the individual has a

1 legitimate claim of entitlement.” *Olim v. Wakinekona*, 461 U.S. 238, 250 (1983). “The  
2 categories of substance and procedure are distinct” and “[p]roperty’ cannot be defined by the  
3 procedures provided for its deprivation.” *Cleveland Board of Education v. Loudermill*, 470 U.S.  
4 532, 541 (1985). Accordingly, the Court concludes that Vorgias may not maintain a due process  
5 claim based solely upon Defendants’ alleged misconduct during the post-termination grievance  
6 proceeding.

7 At the hearing, Vorgias asserted that Defendants’ conduct during the post-termination  
8 grievance proceeding constituted “individual discriminatory acts.” Vorgias has not alleged a  
9 claim of discrimination, nor has she suggested at any point since the inception of the instant case  
10 that Defendants’ conduct was motivated by her gender, race or other impermissible criteria. The  
11 *only* claim she has alleged against Hawley and Dal Cerro is for alleged violation of her right to  
12 due process. For the reasons discussed above, that claim is time-barred. Accordingly, the Court  
13 will grant Defendants’ motion to dismiss without leave to amend.

#### 14 IV. ORDER

15 The motion to dismiss of Hawley and Dal Cerro is GRANTED WITHOUT LEAVE TO  
16 AMEND.

17  
18 Dated: 1/30/07

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20 JEREMY FOGEL  
21 United States District Court  
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1 This Order has been served upon the following persons:

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